



CIVIL JURY INSTRUCTIONS

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INTRODUCTORY INSTRUCTIONS

100. Preliminary Admonitions *(Revised 2004)*

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a fair verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including your family and friends. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to me as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing presented outside this courtroom is evidence unless I specifically tell you it is.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When it is time to begin your deliberations, you will meet in the jury room. You may discuss the case only in the jury room and only when all the jurors are present.

~~Do not let bias, sympathy, prejudice, or public opinion influence your verdict.~~

Just because a party has brought a lawsuit or has been harmed does not, by itself, mean that another party is legally responsible for the harm.

You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

Directions for Use

This instruction should be given at the outset of every case.

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that “it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.”

Sources and Authority

- Article I, section 16 of the California Constitution provides that “trial by jury is an inviolate right and shall be secured to all.”
- Code of Civil Procedure section 608 provides, in part: “In charging the jury the Court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact.” (See also Evid. Code, § 312; Code Civ. Proc., § 592.)
- Under Code of Civil Procedure section 611, jurors may not “form or express an opinion” prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a

juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443–444 [54 Cal.Rptr. 68].)

- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)
- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)
- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co., Inc.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)
- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Elec. Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)
- It is improper for jurors to receive information from the news media about the case. (*Province v. Ctr. for Women’s Health and Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr. 2d 667], disapproved on other grounds in *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr. 2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robbins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)
- Jurors must avoid bias: “ ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.’ [Citations.]” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge’s comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257-259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) “It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge’s opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury’s determination.” (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

INTRODUCTORY INSTRUCTIONS

106. Evidence (*Revised 2004*)

Sworn testimony, documents, or anything else may be admitted into evidence. You must decide what the facts are in this case from the evidence you see or hear during the trial. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

There may be times when I need to talk to the attorneys privately. Do not be concerned about our discussions or try to guess what is being said.

Sometimes an attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:
 Except as otherwise provided by law, where the trial is by jury:
 - (a) All questions of fact are to be decided by the jury.
 - (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.
- Evidence Code section 353 provides:
 A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:
 - (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
 - (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.
- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].)
- Courts have held that “attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.” (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- Courts have stated that “[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished.” (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Presentation at Trial

1A California Trial Guide, Unit 21, Procedures for Determining Admissibility of Evidence, §§ 21.01, 21.03 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 322, Juries and Jury Selection, §§ 322.56–322.57 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, Trial, §§ 551.61, 551.77 (Matthew Bender)

INTRODUCTORY INSTRUCTIONS

112. Questions from Jurors (*New 2004*)

If, during the trial, you have a question you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will discuss your question with the attorneys. For a number of reasons, some questions may not be asked.

Direction for Use

The decision on whether to allow jurors to ask questions is left to the discretion of the judge. The instruction may need to be modified to account for an individual judge's practice.

Sources and Authority

- “In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness.” (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)
- “[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796].)
- “The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection, or of offending the jurors by making the objection, and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other.” (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259])

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 85

EVIDENCE

200. Obligation to Prove—More Likely True Than Not True (*Revised 2004*)

When I tell you that that a party must prove something, I mean that the party must persuade you, by the evidence presented in court, that what he or she is ~~trying~~ required to prove is more likely to be true than not true. This is sometimes referred to as “the burden of proof.”

After weighing all of the evidence, if you cannot decide ~~whether a party has satisfied the burden of proof that something is more likely to be true than not true~~, you must conclude that the party did not prove ~~that fact~~ it. You should consider all the evidence ~~that applies to that fact~~, no matter which party produced the evidence.

In criminal trials, the prosecution must prove ~~facts showing~~ that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove ~~a fact~~ something need ~~only~~ only prove only that ~~the fact~~ it is more likely to be true than not true.

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

For an instruction on clear and convincing evidence, see Instruction 201, *More Likely True—Clear and Convincing Proof*.

Sources and Authority

- Evidence Code section 115 provides: “ ‘Burden of proof’ means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”
- Evidence Code section 500 provides: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”
- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789]; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 305, p. 352.)

- The general rule in California is that “ ‘[i]ssues of fact in civil cases are determined by a preponderance of testimony.’ ” (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 [286 Cal.Rptr. 40, 816 P.2d 892], citation omitted.)
- The preponderance-of-the-evidence standard “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’ ” (*In re Angelia P.* (1981) 28 Cal.3d 908, 918 [171 Cal.Rptr. 637, 623 P.2d 198], citation omitted.)
- “Preponderance of the evidence” “ ‘means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.’ ” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 [276 Cal.Rptr. 430] (quoting *People v. Miller* (1916) 171 Cal. 649, 652 and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word “preponderance”).)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35

Jefferson, California Evidence Benchbook (3d ed. 1997) ch. 45

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, Trial, §§ 551.90, 551.92 (Matthew Bender)

CONTRACTS

326. Assignment Contested (New 2004)

[Name of plaintiff] was not a party to the original contract. However, [name of plaintiff] may bring a claim for breach of the contract if [he/she/it] proves that [name of assignor] transferred [his/her/its] rights under the contract to [name of plaintiff]. This transfer is referred to as an “assignment.”

[Name of plaintiff] must prove that [name of assignor] intended to transfer [his/her/its] contract rights to [name of plaintiff]. In deciding [name of assignor]’s intent, you should consider the entire transaction and the conduct of the parties to the assignment.

[It is not necessary that a transfer of contract rights be made in writing. It may be written, oral, or implied by the conduct of the parties to the assignment.]

Sources and Authority

- Civil Code section 1052 provides: “A transfer may be made without writing, in every case in which a writing is not expressly required by statute.”
- Restatement Second of Contracts, section 342 provides: “It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing.”
- “While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right.” (*Sunburst Bank v. Executive Life Ins. Co.* (1994) 24 Cal.App.4th 1156, 1164 [29 Cal.Rptr.2d 734], internal citations omitted.)
- “The burden of proving an assignment falls upon the party asserting rights thereunder. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee.” (*Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 292 [267 P.2d 16], internal citations omitted.)
- “The accrued right to collect the proceeds of the fire insurance policy is a chose in action, and an effective assignment thereof may be expressed orally as well as in

writing; may be the product of inference; and where the parties to a transaction involving such a policy by their conduct indicate an intention to transfer such proceeds, the courts will imply an assignment thereof. In making such a determination, substance and not form controls.” (*Greco v. Oregon Mutual Fire Insurance Co.* (1961) 191 Cal.App.2d 674, 683 [12 Cal.Rptr. 802], internal citations omitted.)

- “An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right. To ‘assign’ ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.” (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

- 1 Witkin, Summary of California law (9th ed. 1987) Contracts, § 921–932

CONTRACTS

327. Assignment not Contested (*New 2004*)

[*Name of plaintiff*] was not a party to the original contract. However, [he/she/it] may bring a claim for contract damages because [*name of assignor*] transferred the rights under the contract to [*name of plaintiff*]. This transfer is referred to as an “assignment.”

Directions for Use

This instruction is intended to explain to the jury why a party not named in the original contract is nevertheless a party to this case.

Sources and Authority

- Civil Code section 1052 provides: “A transfer may be made without writing, in every case in which a writing is not expressly required by statute.”
- Restatement Second of Contracts section 342 provides: “It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing.”
- “To ‘assign’ ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person. It is the substance and not the form of a transaction which determines whether an assignment was intended. If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.” (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225 [87 Cal.Rptr. 213], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California law (9th ed. 1987) Contracts, § 921–932

NEGLIGENCE

400. Essential Factual Elements (*Revised 2004*)

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s negligence. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] was negligent;
2. That [*name of plaintiff*] was harmed; and
3. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.

~~Just because [*name of plaintiff*] was harmed does not, by itself, mean that [*name of defendant*] is legally responsible for the harm.~~

Directions for Use

In medical malpractice or professional negligence cases, the word “medical” or “professional” should be added before the word “negligence” in the first paragraph. The last sentence of this instruction is intended to address a false belief held by some jurors that they must assign fault just because there is an injury.

Sources and Authority

- Civil Code section 1714(a) provides, in part: “Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully, or by want of ordinary care, brought the injury upon himself.” This statute is the foundation of negligence law in California. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111–112 [70 Cal.Rptr. 97, 443 P.2d 561].)
- The basic elements of a negligence action are: (1) The defendant had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendant failed to meet this standard of conduct, (3) the defendant’s failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496]; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 [25 Cal.Rptr.2d 137, 863 P.2d 207].)
- Restatement Second of Torts, section 328A, provides:
In an action for negligence the plaintiff has the burden of proving:
(a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,

- (b) failure of the defendant to conform to the standard of conduct,
 - (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
 - (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.
- The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury. (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124, 211 Cal.Rptr. 356 [695 P.2d 653].) The trier of fact ordinarily determines whether the defendant breached the standard of care, causation, and the amount of damages, if any.

Commentary

The word “harm” is used throughout these instructions, instead of terms like “loss,” “injury,” and “damage,” because “harm” is all-purpose and suffices in their place.

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 729–734, 748, 749

1 Levy et al., California Torts, Ch. 1, Negligence: Duty and Breach, §§ 1.01–1.31, Ch. 2, Causation, §§ 2.01–2.11, Ch. 3, Proof of Negligence, §§ 3.01–3.34 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.4–1.18

33 California Forms of Pleading and Practice, Ch. 380, Negligence (Matthew Bender)

16 California Points and Authorities, Ch. 165, Negligence, §§ 165.10, 165.20 (Matthew Bender)

PREMISES LIABILITY

VF-1002. Premises Liability—Contributory Negligence of Plaintiff at Issue
(New 2004)

We answer the questions submitted to us as follows:

1. Did [name of defendant] [own/lease/occupy/control] the property?

___Yes

___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant] negligent in the use or maintenance of the property?

___Yes

___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of defendant]'s negligence a substantial factor in causing harm to [name of plaintiff]?

___Yes

___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff]'s damages?

[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:] \$_____]

[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:] \$_____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$_____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$_____]

TOTAL \$_____

If [name of plaintiff] has proved any damages, then answer question 5. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [name of plaintiff] negligent?

___Yes

___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of plaintiff]'s negligence a substantial factor in causing [his/her] harm?

___Yes

___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What percentage of responsibility for [name of plaintiff]'s harm do you assign to the following?

[Name of defendant]: ___%

[Name of plaintiff]: ___%

TOTAL **100 %**

Signed: _____
 Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1000, *Essential Factual Elements (Premises Liability)*, Instruction 405, *Plaintiff's Contributory Negligence*; and Instruction 406, *Apportionment of Responsibility*.

If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

PRODUCTS LIABILITY

1230. Express Warranty—Essential Factual Elements (*Revised 2004*)

[*Name of plaintiff*] **claims that** [*he/she/it*] **was harmed by the** [*product*] **because** [*name of defendant*] **represented, either by words or actions, that the** [*product*] [*insert description of alleged express warranty, e.g., “was safe”*], **but the** [*product*] **was not as represented. To establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of defendant*] [*insert one or more of the following*]

[**made a [statement of fact/promise] [to/received by] [name of plaintiff] that the** [*product*] [*insert description of alleged express warranty*];] [**or**]

[**gave** [*name of plaintiff*] **a description of the** [*product*];] [**or**]

[**gave** [*name of plaintiff*] **a sample or model of the** [*product*];]
2. **That the** [*product*] [*insert one or more of the following*]

[**did not perform as [stated/promised];] [**or****

[**did not meet the quality of the [description/sample/model];]**
3. [**That** [*name of plaintiff*] **took reasonable steps to notify** [*name of defendant*] **within a reasonable time that the** [*product*] **was not as represented, whether or not** [*name of defendant*] **received such notice;**]
4. **That** [*name of plaintiff*] **was harmed; and**
5. **That the failure of the** [*product*] **to be as represented was a substantial factor in causing** [*name of plaintiff*]**’s harm.**

[**Formal words such as “warranty” or “guarantee” are not required to create a warranty. It is also not necessary for** [*name of defendant*] **to have specifically intended to create a warranty. But a warranty is not created if** [*name of defendant*] **simply stated the value of the goods or only gave [his/her] opinion of or recommendation regarding the goods.**]

Directions for Use

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr.

697, 377 P.2d 897]; *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see Instruction 1243, *Notification/Reasonable Time*.

Sources and Authority

- “A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.” (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392], internal citation omitted.)
- “A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity.” (3 Witkin, Summary of Cal. Law (9th ed. 1987) Sales, § 50, p. 46.)
- California Commercial Code section 2313 provides:
 - (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
 - (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.
- California Commercial Code section 2102 provides: “Unless the context otherwise requires, this division applies to transactions in goods.” Section 2105 defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.”
- “Privity is not required for an action based upon an express warranty.” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, n. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)
- “The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made.” (*Keith, supra*, 173 Cal.App.3d at p. 21, internal citation omitted.)

- “Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller’s opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature.” (*Keith, supra*, 173 Cal.App.3d at p. 21.)
- “It is important to note ... that even statements of opinion can become warranties under the code if they become part of the basis of the bargain.” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 10 [120 Cal.Rptr. 681, 534 P.2d 377].)
- The California Supreme Court has stated that “[t]he basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof.” (*Hauter, supra*, 14 Cal.3d at p. 115.) However, the court also noted that there is some controversy as to the role, if any, of reliance in this area.
- The court in *Keith, supra*, 173 Cal.App.3d at p. 23, held that the seller has the burden of proving that the bargain did not rest at all on the representation, for example, by showing that the buyer inspected and discovered the defect before the contract was made.
- “It is immaterial whether defendant had actual knowledge of the contraindications. ‘The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.’ ” (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369], internal citations omitted.)
- “[A] sale is ordinarily an essential element of any warranty, express or implied ... [citations].” (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417].)

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 55–63A

California Products Liability Actions, Ch. 2, Liability for Defective Products, §§ 2.31–2.33, Ch. 7, Proof, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, §§ 502.23, 502.42–502.50, 502.140–502.150 (Matthew Bender)

20 California Points and Authorities, Ch. 206, Sales (Matthew Bender)

PRODUCTS LIABILITY

**VF-1206. Products Liability—Express Warranty—Affirmative Defense—Not
“Basis of Bargain” (Revised 2004)**

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* represent to *[name of plaintiff]* by a *[statement of fact/promise/ description/sample/model]* that the *[product]* *[insert description of alleged express warranty]*?

___Yes

___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of plaintiff]* rely on *[name of defendant]*'s *[statement of fact/promise/ description/sample/model]* in deciding to *[purchase/use]* the *[product]*?

___Yes

___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the *[product]* fail to *[perform]* *[or]* *[have the same quality]* as represented?

___Yes

___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the failure of the *[product]* to *[perform]* *[or]* *[meet the quality]* as represented a substantial factor in causing harm to *[name of plaintiff]*?

___Yes

___No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are [name of plaintiff]'s damages?

**[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:]** \$_____]

**[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:]** \$ _____]

**[c. Past noneconomic loss, including [physical
pain/mental suffering:]** \$_____]

**[d. Future noneconomic loss, including [physical
pain/mental suffering:]** \$_____]

TOTAL \$_____

Signed: _____

Presiding Juror

Dated: _____

**[After it has been signed/After all verdict forms have been signed], deliver this
verdict form to the [clerk/bailiff/judge].**

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Under various circumstances, the plaintiff must also prove that he or she made a reasonable attempt to notify the defendant of the defect. Thus, where appropriate, the following question should be added prior to the question regarding the plaintiff's harm: "Did [name of plaintiff] take reasonable steps to notify [name of defendant] within a reasonable time that the [product] [was not/did not perform] as requested?"

This verdict form is based on Instruction 1230, *Express Warranty—Essential Factual Elements*, and Instruction 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment. Do not include question 2 if the affirmative defense is not at issue.

SONG-BEVERLY CONSUMER WARRANTY ACT

**3201. Violation of Civil Code Section 1793.2(d)—New Motor Vehicle—
Essential Factual Elements (*Revised 2004*)**

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s breach of a warranty. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] bought a[n] [*new motor vehicle*] [from/distributed by/ manufactured by] [*name of defendant*];
2. That [*name of defendant*] gave [*name of plaintiff*] a written warranty ~~that~~ [*describe alleged express warranty*];
3. That the vehicle had [a] defect[s] covered by the warranty that substantially impaired ~~its~~ the vehicle's use, value, or safety to a reasonable buyer in [*name of plaintiff*]'s situation;
4. [That [*name of plaintiff*] delivered the vehicle to [*name of defendant*] or its authorized repair facilities for repair of the defect[s];

[That [*name of plaintiff*] notified [*name of defendant*] in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to [*name of defendant*] or its authorized repair facilities due to the nature of the defect[s]];

5. That [*name of defendant*] or its ~~representative~~ authorized repair facility failed to ~~service or repair the vehicle to match the written warranty~~ defect[s] after a reasonable number of opportunities to do so; ~~and~~
6. That [*name of defendant*] did not promptly replace or buy back the vehicle as requested by [*name of plaintiff*];
7. That [*name of plaintiff*] was harmed; and
8. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

[It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*new motor vehicle*].]

[A written warranty need not include the words “warranty” or “guarantee,” but if those words are used, a warranty is created. It is also not necessary for [*name of defendant*] to have specifically intended to create a warranty. A warranty is not created if [*name of defendant*] simply stated the value of the vehicle or gave an

opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines such proof is necessary, add the following element to this instruction:

That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also Instruction 1243, *Notification/Reasonable Time*.

Regarding element 4, where the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute—see Civil Code section 1793.2(c)—is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. ~~add: “It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*new motor vehicle*].”~~ The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good “did not conform to the express warranty.” (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)

Sources and Authority

- “Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer’s remedies to include costs, attorney fees and civil penalties. . . . [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties.” (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- “A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially

impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element).” (*Oregel, supra*, 90 Cal.App.4th at p. 1101.)

- Civil Code section 1794(a) provides, in part: “Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an . . . express warranty . . . may bring an action for the recovery of damages and other legal and equitable relief.”
- Civil Code section 1790.3 provides: “The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail.”
- Civil Code section 1791.2 provides:
 - (a) “Express warranty” means:
 - (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
 - (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
 - (b) It is not necessary to the creation of an express warranty that formal words such as “warrant” or “guarantee” be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
 - (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.
- Civil Code section 1795 provides, in part: “If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer.”
- Civil Code section 1793.22(e)(2) provides, in part: “ ‘New motor vehicle’ means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. ‘New motor vehicle’ also means a new motor vehicle . . . that is bought or used primarily for business purposes by a person . . . or any . . . legal entity, to which not more than five motor vehicles are registered in this state. ‘New motor vehicle’ includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion . . . , a dealer-owned vehicle and a ‘demonstrator’ or other motor vehicle sold with a manufacturer’s new car warranty.”

- “Under well-recognized rules of statutory construction, the more specific definition [of “new motor vehicle”] found in the current section 1793.22 governs the more general definition [of “consumer goods”] found in section 1791.” (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)
- “ ‘Nonconformity’ is defined as ‘a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.’ The term is similar to what the average person would understand to be a ‘defect.’ ” (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted.)
- “The issue of whether the problems constituted substantial impairment is one for the trier of fact.” (*Schreidel, supra*, 34 Cal.App.4th at p. 1250.)
- “Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied, however, within the specific circumstances of the buyer.” (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 478 [104 Cal.Rptr.2d 545], internal citations omitted.)
- Civil Code section 1793.2(d)(2) provides, in part: “If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer. . . . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.”
- “[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer’s use of the motor vehicle. These ‘Lemon Law’ provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty.” (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)
- Civil Code section 1793.2(c) provides, in part: “The buyer shall deliver nonconforming goods to the manufacturer’s service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its

service and repair facility shall constitute return of the goods for purposes of this section.”

- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, “[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted.” (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)
- “[T]he only affirmative step the Act imposes on consumers is to ‘permit[] the manufacturer a reasonable opportunity to repair the vehicle.’ ” (*Oregel, supra*, 90 Cal.App.4th at p. 1103, internal citation omitted.)
- Civil Code section 1793.1(a)(2) provides, in part: “The warranty period will be extended for the number of whole days that the product has been out of the buyer’s hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed.”
- Civil Code section 1795.6 provides, in part:
 - (a) Every warranty period relating to an . . . express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer’s possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer’s residence.
 - (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if . . . : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47–48, 50–51, 240–243; *id.* (2002 supp.) at §§ 51, 55, 306–308, pp. 14–15, 94–103

1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, § at 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31, (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id.* (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37

3202. “Repair Opportunities” Explained (*Revised 2004*)

Each time the [consumer good] was given to [name of defendant] [or its representative] for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.

In determining whether [name of defendant] had a reasonable number of opportunities to fix the [consumer good], you should consider all of the circumstances surrounding each repair visit. [Name of defendant] must have been given at least two opportunities to fix the [consumer good].

Sources and Authority

- Civil Code section 1793.2(d) provides, in part:
 - (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. ...
 - (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer.
- “[T]he only affirmative step the Act imposes on consumers is to ‘permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.’ Whether or not the manufacturer’s agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible.” (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citation omitted.)

Secondary Sources

2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

SONG-BEVERLY CONSUMER WARRANTY ACT

**3203. Reasonable Number of Repair Opportunities—
Rebuttable Presumption (Civ. Code, § 1793.22(b)) (Revised 2004)**

The number of opportunities to make repairs is presumed to be reasonable if [*name of plaintiff*] proves that within [18 months from delivery of the [*new motor vehicle*] to [him/her/it]] [or] [the first 18,000 miles] [*insert option A, B, and/or C:*]

- [A. 1. ~~That~~ The vehicle was made available to [*name of defendant*] [or its agent authorized repair facility] for repair of the same defect two or more times; [and]
2. ~~That~~ The defect resulted in a condition that was likely to cause death or serious bodily injury if the vehicle was driven; [and]
3. [~~That~~ [*Name of plaintiff*] directly told notified [*name of manufacturer*] in writing about the need to repair the defect;]
- [or]]

- [B. 1. ~~That~~ The vehicle was made available to [*name of defendant*] [or its agent authorized repair facility] for repair of the same defect four or more times; [and]
2. [~~That~~ [*Name of plaintiff*] directly told notified [*name of manufacturer*] in writing about the need to repair the defect;]
- [or]]

- [C. ~~That~~ The vehicle was out of service for repair of defects by [*name of defendant*] [or its agent authorized repair facility] for more than 30 days.]

If [*name of plaintiff*] has proved these facts, then the number of opportunities to make repairs was reasonable unless [*name of defendant*] proves that under all the circumstances [[*name of defendant*]/or its agent authorized repair facility] was not given a reasonable opportunity to repair the defect.

[The 30-day limit for repairing defects will be lengthened if [*name of defendant*] proves that repairs could not be made due to conditions beyond the control of [*name of defendant*] or its agent authorized repair facility.]

Directions for Use

This instruction should not be given if none of the enumerated situations apply to the plaintiff's case. (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1245 [13 Cal.Rptr.3d 679].)

Note that the factfinder's inquiry should be focused on overall reasonableness of the opportunities plaintiff gave defendant to make repairs. Therefore, while satisfying the

rebuttable presumption (without having it overcome by defendant) is one way for plaintiff to satisfy the reasonable opportunities requirement, he or she may do so in other ways instead. Likewise, because the statutory presumption is rebuttable, defendant is allowed an opportunity to overcome it.

The rebuttable presumption concerning the number of repair attempts applies only to new motor vehicles—see the Tanner Consumer Protection Act. (Civ. Code, § 1793.22(b).)

The bracketed language in the first two optional paragraphs concerning notice directly to the manufacturer are applicable only if “the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner’s manual, the provisions of [the Tanner Consumer Protection Act] and that of [Civil Code section 1793.2(d)], including the requirement that the buyer must notify the manufacturer directly.” (See Civ. Code, § 1793.22(b)(3).) This is a matter that the judge should determine ahead of time as an issue of law.

Sources and Authority

- Civil Code section 1793.2(d)(2) provides, in part: “If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer.”
- “We believe . . . that the only affirmative step the Act imposes on consumers is to ‘permit[] the manufacturer a reasonable opportunity to repair the vehicle.’ Whether or not the manufacturer’s agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible.” (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103–1104 [109 Cal.Rptr.2d 583], internal citations and footnote omitted.)
- Civil Code section 1793.22(b) provides, in part:
It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:
 - (1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.
 - (2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

- (3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to paragraphs (1) and (2) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and that of subdivision (d) of Section 1793.2, including the requirement that the buyer must notify the manufacturer directly pursuant to paragraphs (1) and (2). The notification, if required, shall be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual. This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action."

Secondary Sources

2 Sales & Leases (Cont.Ed.Bar 2001) Prelitigation Remedies, § 13.68, pp. 619–621

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:27, pp. 33–34

3204. “Substantially Impaired” Explained (*New 2004*)

In deciding whether the vehicle’s defect[s], if any, substantially impaired the vehicle’s use, value, or safety, you should consider, among other factors, the following:

- (a) The nature of the defect[s];**
 - (b) The cost and length of time required for repair;**
 - (c) Whether past repair attempts have been successful;**
 - (d) The degree to which the vehicle could be used while awaiting repair;**
 - (e) The inconvenience to [name of plaintiff]; and**
 - (f) The availability and cost of alternative transportation during the repairs.**
-

Sources and Authority

- “Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied, however, within the specific circumstances of the buyer.” (*Lundy v. Ford Motor Company* (2001) 87 Cal.App.4th 472, 478 [104 Cal.Rptr.2d 545], internal citations omitted.)
- “The issue of whether the problems constituted substantial impairment is one for the trier of fact.” (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250, internal citations omitted.)
- “The term [‘substantially’] modifies its object, ‘impairment.’ It injects an element of degree; not every impairment is sufficient to satisfy the statute. The most analogous definition of ‘substantially’ we have found in a context similar to its usage here is in the Uniform Commercial Code, section 2-608. Like the clause at issue here, this provision requires a determination of whether a defect ‘substantially impairs’ the value of goods sold to a buyer. Under it, the trier of fact may consider: ‘the nature of the defects; the cost and length of time required for repair; whether past repair attempts have been successful; the degree to which the goods can be used while repairs are attempted; [inconvenience to buyer]; and the availability and cost of alternative goods pending repair’ It may be that this term, like ‘reasonable,’ is incapable of precise definition. At the least, the requirement is not satisfied by any impairment, however insignificant, that affects use, value, or safety.” (*Lundy, supra*, 87 Cal.App.4th at p. 478, internal citations omitted.)

Secondary Sources

3 Witkin, *Summary of California Law* (9th ed. 1987) Sales, § 307, pp. 241–242; id. (2002 supp.) at § 307, p. 100

SONG-BEVERLY CONSUMER WARRANTY ACT

3220. Affirmative Defense—Unauthorized or Unreasonable Use
(Revised 2004)

[Name of defendant] is not responsible for any harm to [name of plaintiff] if ~~he/she/it~~ [name of defendant] proves that any [defect[s] in the [consumer good]] [failure to match any [written/implied] warranty] [was/ were] caused by unauthorized or unreasonable use of the [consumer good] after it was sold.

Sources and Authority

- Civil Code section 1794.3 provides: “The provisions of this [act] shall not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale.”

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 306, p. 240

California Products Liability Actions, Ch. 8, Defenses, § 8.07[7] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney’s California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:55, p. 66

SONG-BEVERLY CONSUMER WARRANTY ACT

3241. Restitution From Manufacturer—New Motor Vehicle (*Revised 2004*)

If you decide that [name of defendant] or its ~~representative~~ authorized repair facility did not repair or service the [motor vehicle] to match the [written warranty/represented quality] after a reasonable number of opportunities, then [name of plaintiff] is entitled to recover the ~~price~~ amounts [he/she] proves [he/she] paid for the car, including:

1. The purchase price of the vehicle itself;
2. Charges for transportation and manufacturer-installed options;
3. Finance charges actually paid by [name of plaintiff]; and
4. Sales tax, license fees, registration fees, and other official fees.

~~You must subtract from~~ In determining the purchase price, do not include any charges for items ~~not~~ supplied by someone other than [name of defendant].

[You must determine the vehicle's mileage between the time when [name of plaintiff] took possession of the vehicle and the time when [name of plaintiff] first delivered the vehicle to [name of defendant] or its authorized ~~service and~~ repair facility to fix the problem. [Name of defendant] must prove the vehicle's mileage. Using this mileage number, I will reduce [name of plaintiff]'s recovery based on a formula.]

Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. For claims involving other consumer goods, see Instruction 3240, *Reimbursement Damages—Consumer Goods*.

This instruction can be modified if it is being used for claims other than those described in the instructions. In lieu of restitution, plaintiff may request replacement with 'a new motor vehicle substantially identical to the vehicle replaced,' pursuant to Civil Code § 1793.2(d)(2)(A). If plaintiff so requests, elements 1–4 should be replaced with appropriate language.

The "formula" referenced in the last bracketed paragraph can be found at Civil Code section 1793.2(d)(2)(C).

Sources and Authority

- Civil Code section 1794(b) provides:

The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:

- (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
 - (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.
- Civil Code section 1793.2(d)(2) provides, in part:

If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.

 - (A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
 - (B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
 - (C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall

be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

- “[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes ‘the cost of repairs necessary to make the goods conform.’” (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10], internal citation omitted.)
- “[I]n the usual situation, emotional distress damages are not recoverable under the Song-Beverly Consumer Warranty Act.” (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159]; see also *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187–192 [28 Cal.Rptr.2d 371].)
- “[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act’s remedial purpose and section 1793.2(d)(2)(B)’s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute.” (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308, pp. 242–243; *id.* (2002 supp.) at § 308, pp. 99–103

1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, § 7.87, pp. 293–294

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney’s California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, pp. 41–43

SONG-BEVERLY CONSUMER WARRANTY ACT

**VF-3203. Breach of Express Warranty—New Motor Vehicle—Civil Penalty
Sought (Revised 2004)**

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* buy a[n] *[new motor vehicle]* [from/distributed by/
manufactured by] *[name of defendant]*?

___Yes

___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of defendant]* give *[name of plaintiff]* a written warranty?

___Yes

___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the vehicle have a defect covered by the warranty that substantially impaired ~~it's~~ the vehicle's use, value, or safety to a reasonable buyer in *[name of plaintiff]'s situation*?

___Yes

___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did *[name of defendant]* or its authorized repair facility ~~service or fail to~~ repair the ~~vehicle to conform to the written warranty~~ defect[s] after a reasonable number of opportunities to do so?

___Yes

___No

If your answer to question 4 is ~~no~~ yes, then answer question 5. If you answered yes no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [name of defendant] fail to promptly replace or repurchase the vehicle as requested by [name of plaintiff]?

___ Yes

___ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

\$ _____

Answer question 7.

7. Did [name of defendant] intentionally fail to repurchase or replace the [new motor vehicle]?

___ Yes

___ No

Answer question 8.

8. What amount, if any, do you impose as a penalty? \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. If there are multiple causes of action, users may wish to combine the individual forms into one form.

This verdict form is based on Instruction 3201, *Violation of Civil Code Section 1793.2(d)—New Motor Vehicle—Essential Factual Elements* and Instruction 3244, *Civil Penalty—Willful Violation (Civ. Code, § 1794(c))*. See Verdict Form 3201 for additional questions in the event the plaintiff is claiming consequential damages. If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of Instruction 3201.

CONCLUDING INSTRUCTIONS

5000. Duties of the Judge and Jury (*Revised 2004*)

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. Just because a party has brought a lawsuit or has been harmed does not, by itself, mean that another party is legally responsible for the harm. You must decide the facts based on the evidence admitted in this trial. You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 608 provides that “[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict.” It also provides that the court “must inform the jury that they are the exclusive judges of all questions of fact.” (See also Code Civ. Proc., § 592.)
- Evidence Code section 312(a) provides that “[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury.”
- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478–479 [6 Cal.Rptr. 289, 353 P.2d 929].)
- Jurors must avoid bias: “ ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.’ [Citations.]” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)
- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630.)
- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57–59 [118 Cal.Rptr. 184, 529 P.2d 608], the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided should be considered in weighing the net effect of the instructions on the jury.

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 268

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.21 (Matthew Bender)

CONCLUDING INSTRUCTIONS

5010. Taking Notes During the Trial (*Revised 2004*)

If you have taken notes during the trial you ~~will now be allowed to~~ may take them with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

~~[The court reporter made a record of everything that was said. If during deliberations you have a question about what the witness said, you may ask in writing for the testimony to be read to you. You must accept the court reporter's record as accurate.]~~

Directions for Use

The last bracketed paragraph should not be read if a court reporter is not being used to record the trial proceedings. If this instruction is used, the Advisory Committee recommends that it be read to the jury after reading instructions on the substantive law.

Sources and Authority

- “Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include ‘an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker’s own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.’ ” (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810, 685 P.2d 1161], internal citations and footnote omitted.)
- “In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is ‘the better practice’ for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in *Whitt* to be adequate: ‘Be careful as to the amount of notes that you take. I’d rather that you observe the witness, observe the demeanor of that witness, listen to how that person

testifies rather than taking copious notes. ... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back' ” (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321], internal citations and footnote omitted.)

CONCLUDING INSTRUCTIONS

5011. Reading Back of Trial Testimony (*Revised 2004*)

You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you ~~in the jury room~~. You may request that all or a part of a witness's testimony be read. ~~[There is no written transcript of the testimony, only the court reporter's record.]~~

~~Reading testimony takes as long as it took for the testimony to be presented in court.~~ Your request should be as specific as possible. It will be helpful if you can state:

1. The name of the witness;
2. The subject matter of the testimony you would like to have read; and
3. The name of the attorney or attorneys asking the questions when the testimony was given.

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested.

While the court reporter is ~~in the jury room~~ reading the testimony, you may not deliberate or discuss the case. ~~You must conduct yourself as if the testimony were being presented in court and you were seated in the jury box.~~

You may not ask the court reporter to read testimony that was not specifically mentioned in a written request. If your notes differ from the testimony, you must accept the court reporter's record as accurate.

Directions for Use

~~This instruction should not be given~~ The read-back should not be conducted in the jury room unless the attorneys stipulate to the reading back of testimony that location.

Sources and Authority

- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into Court. Upon their being brought into Court, the information required must be given in the presence of, or after notice to, the parties or counsel."

- “Section 614 of the Code of Civil Procedure provides that if there is a disagreement among jurors during their deliberations as to any part of the testimony which they have heard they may return into court and secure from the court in the presence of counsel for all parties the desired information as to the record. If they ask for testimony relating to a specified subject, they are entitled to hear all of it. However, it is equally clear that the trial judge does not have to order read any part of the record which is not thus requested by the jury foreman.” (*McGuire v. W. A. Thompson Distributing Co.* (1963) 215 Cal.App.2d 356, 365–366 [30 Cal.Rptr. 113], internal citations omitted.)
- “When the jury requests a repetition of certain testimony, the trial court is not required to furnish the jury with testimony not requested.” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 422 [167 Cal.Rptr. 270], internal citations omitted.)
- “Appellants assign as error the court’s refusal to comply with their counsel’s request for testimony reading. It was not. It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury’s wishes.” (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714 [37 Cal.Rptr. 652], italics in original.)

Secondary Sources

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.32
(Matthew Bender)

4 California Trial Guide, Unit 91 Jury Deliberations and Rendition of Verdict, § 91.01
(Matthew Bender)

CONCLUDING INSTRUCTIONS

5015. Instruction to Alternate Jurors (*New 2004*)

As alternate jurors, you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You should not form or express any opinion about this case until after you have been substituted in for one of the deliberating jurors on the panel or until the jury has been discharged.

Directions For Use

If an alternate juror is substituted, see Instruction 5014, *Substitution of Alternate Juror*.

Sources And Authority

- “Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048, internal citations omitted.)
- Code of Civil Procedure section 234 provides:

Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as “alternate jurors.”

These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.